

UNREDACTED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

ROBERT HOLMAN

VS

THOMAS J. VILSACK, in his
official capacity as Secretary of the
United States, Dept of Agriculture,

ZACH DUCHENEAUX, in his
official capacity as Administrator
of the Farm Service Agency

)
)
) NO.1:21-CV-01085-STA
) JACKSON, TENNESSEE
)

MOTION HEARING

JUNE 29, 2021

BEFORE THE HONORABLE S. THOMAS ANDERSON,

UNITED STATES CHIEF JUDGE

KRISTI HEASLEY, RPR
OFFICIAL COURT REPORTER
U.S. COURTHOUSE, SUITE 450
111 SOUTH HIGHLAND AVENUE
JACKSON, TENNESSEE 38301

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EXAMINATION INDEX
NO TESTIMONY OFFERED

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EXHIBITS

NO EXHIBITS MARKED

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1 THE COURT: This is Robert Holman versus
2 Thomas Vilsack, et al, NO. 21-1085.

3 Let's see, who is going to be appearing on
4 behalf of the plaintiff?

5 MR. BOUCEK: Braden Boucek. I'll be
6 appearing on behalf of the plaintiff.

7 THE COURT: All right. Mr. Boucek.
8 And on behalf of the defendant?

9 MS. CALKINS: Morning, Your Honor. This
10 is Audrey Calkins for the government.

11 THE COURT: All right. Ms. Calkins.

12 MS. CALKINS: Ms. Kyla Snow is in from
13 Main Justice, and she'll be appearing for us.

14 THE COURT: I'm sorry. What is your name?

15 MS. SNOW: Kyla Snow.

16 THE COURT: Ms. Snow. Okay.

17 MR. BOUCEK: Your Honor, I would be remiss
18 in not pointing out my co-counsel, Mr. Will Trachman from
19 Mountain States Legal.

20 THE COURT: Okay. All right. Well, let's
21 see where we are.

22 Mr. Boucek, where are we as far as you're
23 concerned in light of the other cases that have been
24 considered up to this point?

25 Give me an overview. By the way, I'll let

1 everyone remain seated. We won't make you stand because
2 of pandemic. If you would like to remove your mask, I
3 don't mind. That's an individual table decision, I
4 suppose, at this point, whatever you prefer to do.

5 If you don't remove your mask, then you're
6 going to need to speak up so the court reporter can make
7 sure she hears everything clearly.

8 But, Mr. Boucek, where do you say we are
9 this morning?

10 MR. BOUCEK: Thank you, Your Honor.

11 The procedural posture of this case is
12 that we have filed a Motion for Preliminary Injunction.
13 As the Court, I think, is alluding to, there are several
14 other related cases percolating in other districts.

15 There is a case in Eastern District of
16 Wisconsin that has resulted in a temporary restraining
17 order. That case is Faust v Vilsack.

18 And then just last week the Middle
19 District of Florida issued a preliminary injunction
20 halting enforcement of Section 1005.

21 However, we persist in our request for
22 preliminary injunction for the reasons explained in our
23 motion as I'm happy to relate to the Court here today.
24 But that's in summary of review of where we stand.

25 THE COURT: Okay. Ms. Snow or Ms.

1 Calkins.

2 MS. SNOW: Your Honor, opposing counsel
3 has accurately stated where things are at in the other
4 courts in Faust and the PI order that was recently
5 entered in Wynn.

6 We don't think that those cases govern the
7 outcome here, for various reasons. But just a quick,
8 just two points that I just like to make up front is that
9 because of those orders that have been entered, there is
10 no imminent harm here that would warrant entering another
11 duplicative injunction.

12 But also more importantly, we think that
13 the plaintiff hasn't shown any irreparable harm, which I
14 can go into that further and address the Court's
15 questions on that. We think that the analysis in Faust
16 and in Wynn should not be followed here.

17 But, again, I can go into that further and
18 address specific questions on that point.

19 THE COURT: Okay. Well, yeah, I have
20 several questions. We'll get to those momentarily.

21 Would either side like to make any kind of
22 opening statement? Obviously, I've read and we've read
23 all of the pleadings that have been filed. And I think
24 I've got a pretty good understanding of the positions of
25 the parties.

1 Any kind of opening remarks you want to
2 make, Mr. Boucek?

3 MR. BOUCEK: No. Your Honor, I know the
4 Court has read our pleadings and they adequately relate
5 our positions. Essentially, we think that the Court -- I
6 certainly agree with Ms. Snow, that the decisions in the
7 other districts are persuasive, but not mandatory.

8 However, that said, the reasoning in it is
9 totally correct. The Courts there considered the very
10 same evidence that they've offered here today. The
11 standard is strict scrutiny. That is a very demanding
12 standard. And we rely liberally on the recent Sixth
13 Circuit opinion from a month ago, Vitolo v Guzman.

14 THE COURT REPORTER: Wait. Of who?

15 THE COURT: Slow down just a little. Just
16 remember that the court reporter has to take down
17 everything that's said. She's great, but there is only
18 so much she can get down in a few seconds. So slow down
19 just a little.

20 MR. BOUCEK: Thank you, Your Honor.

21 I need these reminders periodically. It's
22 been a year since they've let me out, so I'm a little
23 rusty.

24 THE COURT: Okay.

25 MR. BOUCEK: But, Your Honor, the recent

1 Sixth Circuit opinion of Vitolo v Guzman, which we've
2 cited frequently in our brief, is binding authority on
3 this Court. It's issued from a month ago. It considered
4 a very similar provision of the American Rescue Plan Act
5 of 2021, this one dealing with socially disadvantaged
6 restaurant owners.

7 And the Court there concluded that the
8 plaintiff faced an irreparable --

9 THE COURT: Slow down.

10 MR. BOUCEK: -- faced an irreparable harm.

11 And for the reasons as explained in
12 Vitolo, Faust and in the Wynn opinions, we think that
13 this Court should find that there is a likelihood of
14 plaintiff prevailing.

15 Candidly, we think based on what has been
16 proffered there is a certainty of the plaintiff
17 prevailing, and ask the Court for an immediate injunction
18 that halts the enforcement of Section 1005.

19 THE COURT: All right. Ms. Snow, would
20 you like to make an opening statement, or any kind of
21 open remarks?

22 MS. SNOW: Yes, Your Honor. I'll respond
23 to the points that opposing counsel raised.

24 With respect to the other decisions,
25 they -- you know, they got the analysis wrong on

1 irreparable harm and on the merits of the claim here.

2 And the Vitolo decision does not control.

3 That was a decision that arose in the PI
4 posture. And the Court did not -- it was reviewing a
5 preliminary injunction order, and the Court there was not
6 setting broadly applicable rules that apply to all equal
7 protection cases.

8 And importantly, the program that was at
9 issue there is very different from the program here. And
10 one of the key differences is that the funds that were
11 allocated by the statute in that case were limited and
12 were only available to Africans on a priority basis.

13 And so because of the very -- the Court
14 said there was a very real risk that funds could run out
15 before the case was decided, and that warranted the
16 preliminary injunction there.

17 That is not an issue in this case. We
18 have an unlimited pot of funds. The statute does not set
19 any kind of deadline for their expenditure. And the
20 Court can, at the end of this case, it can order relief,
21 and it should, that -- if it concludes that the statute
22 is -- or that the program as it's being implemented is
23 unconstitutional.

24 It would be more in line with Congress's
25 intent and consistent with Supreme Court case law

1 governing equal protection remedies to expand the
2 beneficiaries of the funds here, rather than withdrawing
3 them completely from the socially disadvantaged farmers,
4 who Congress was plainly attempting to protect, and who
5 face substantial harm if they are not able to receive the
6 funds that they have an expectation in receiving.

7 With respect to the merits, the government
8 does have a -- well, the plaintiff has not shown that he
9 has a substantial likelihood of success on his equal
10 protection claim. The government -- Congress relied on
11 substantial evidence documenting the history of
12 discrimination specific to USDA loan programs. And the
13 situation of minority farmers as compared to non-minority
14 farmers today just underscores how that long history of
15 discrimination is having ongoing lingering effects. And
16 that places them at a substantial disadvantage, facing
17 higher risk of foreclosure, higher rates of delinquency,
18 which a pandemic has only exacerbated. And Congress's
19 has recent funds largely failed to reach minority
20 farmers.

21 Congress was relying on all this evidence
22 when it adopted this measure in Section 1005. It had a
23 strong basis in evidence for concluding that this
24 remedial relief was warranted. And plaintiff has not
25 shown, and the other cases do not support the conclusion

1 that he is likely to succeed on the merits of showing
2 that this program is unconstitutional, which he bears the
3 burden of doing.

4 Even apart from the preliminary injunction
5 posture, it is his burden to show the unconstitutionality
6 of the program.

7 So for all those reasons, and
8 significantly because of the substantial harm that the
9 preliminary jurisdiction would impose, you know, further
10 delaying payments to socially disadvantaged farmers would
11 impose, a preliminary injunction is simply not warranted
12 here.

13 THE COURT: All right. Let's break some
14 of this down.

15 Ms. Snow, do you agree that strict
16 scrutiny is the appropriate standard in the case?

17 MS. SNOW: Yes, Your Honor.

18 THE COURT: Okay. And one thing that I
19 think Mr. Boucek mentioned, he indicated that the
20 evidence in this case is identical to or comparable to
21 the evidence that was presented in the other two cases.
22 And by that I mean, out of Wisconsin and Florida.

23 Do you agree with that or disagree with
24 that?

25 MS. SNOW: I agree with that, Your Honor.

1 THE COURT: All right. So we've got
2 strict scrutiny. The evidence that you would present or
3 that you plan to present here today would be pretty much
4 identical. Might be some small variances, but would be
5 pretty much identical to the evidence that was presented
6 to the Judges in the Middle District of Florida and in
7 Wisconsin.

8 MS. SNOW: Yes.

9 THE COURT: Okay. Well, do you also
10 agree -- I'll just tell all of you, I've got a list of
11 questions. And I'm just going to go through my questions
12 and give both sides an opportunity to respond. I think
13 that may be the most productive way to approach this.

14 Ms. Snow, would you agree that government
15 policies that classify people by race are presumptively
16 invalid?

17 MS. SNOW: No, Your Honor. It depends on
18 the purpose of the program and whether it is narrowly
19 tailored to the purpose that, for which the government
20 has adopted the program.

21 So while it's strict scrutiny analysis, it
22 is a high bar. It is not fatal in fact, as the Supreme
23 Court has stated. So we think that there is substantial
24 evidence here that shows that this program is narrowly
25 tailored.

1 THE COURT: Well, are you saying then that
2 the government has the responsibility to show that there
3 is compelling interest. Correct?

4 MS. SNOW: Yes, that's correct.

5 THE COURT: And that the program is
6 narrowly tailored?

7 MS. SNOW: Yes.

8 THE COURT: Would you agree with that?

9 MS. SNOW: Yes, I agree.

10 THE COURT: All right. So just for the
11 record, what do you say is the compelling interest in
12 this situation?

13 MS. SNOW: Congress had a compelling
14 interest in remedying the effects of lingering
15 discrimination. Which Adarand and Croson make clear that
16 that is -- the government has a compelling interest in
17 remedying past discrimination and its lingering affects.

18 Paradise -- the Supreme Court's Paradise
19 case also states that at 167. And Congress also had a
20 compelling interest in ensuring that its funds were not
21 used in a manner that perpetuated the effects of
22 discrimination. Croson has also stated at, I believe
23 that's at 469, that the government has an interest in
24 ensuring that its funds are not being used in a way that
25 allows it to be a passive participant in systemic

1 discrimination.

2 And so both of those interests are
3 based -- Congress had a strong basis in evidence for both
4 of those interests.

5 With respect to the lingering affects of
6 discrimination, Secretary Vilsack stated to Congress in
7 the lead-up to Section 1005's passage that historic
8 discrimination has plagued programs at the USDA, and
9 especially the farm loan programs.

10 Congress was targeting USDA's farm loan
11 programs --

12 THE COURT: Let me stop you there just a
13 minute.

14 Would you agree that the government has
15 already taken steps previously to address or remedy the
16 history of discrimination?

17 MS. SNOW: The government -- yes, it has
18 taken steps that have been ineffective at --

19 THE COURT: Been ineffective?

20 MS. SNOW: Yes.

21 THE COURT: All right. What steps or what
22 programs have previously been designed to address what
23 you refer to as the lingering discrimination or the
24 history of discrimination?

25 MS. SNOW: So Congress has taken steps

1 to -- as early as 1990 it created an outreach program in
2 Section 2501 to provide further outreach to minority
3 farmers who it had concluded were not being served or who
4 had been cut out of USDA programs and not been offered
5 USDA loans at the same rates or on the same types of
6 terms as non-minority farmers were receiving --

7 THE COURT: So the first one you are
8 referring to is the 1990 program. Right?

9 MS. SNOW: Yes. Yes.

10 Then in 2002 and 2008 Congress took steps
11 to restructure county committees, to try to provide for
12 greater minority representation on county committees,
13 which were largely white and not attune to the interests
14 of minorities. And just -- there was like a lack of
15 awareness in serving minority farmers and the particular
16 needs.

17 So Congress took steps to restructure
18 those to ensure there would be greater representation.

19 And in 2002, based on substantial evidence
20 that the civil rights complaints filed by minority
21 farmers were largely going ignored, or that there were
22 just substantial delays in processing them, or no
23 findings of violations despite this large volume of
24 complaints, in 2002 Congress took steps to establish a
25 secretary that, and a new office that would be -- to

1 better address those concerns and to provide for
2 structures that would actually address those civil rights
3 complaints.

4 And then there is the series of class
5 actions in, beginning in the late '90s, the Pigford and
6 related cases, in which different groups of minority
7 farmers, starting after African-Americans and Hispanics
8 and Native Americans filed complaints of discrimination
9 based on the adverse loans or failure to receive loans
10 and the civil rights complaints that were going ignored.

11 And the USDA set up -- engaged in
12 settlements and set up claims processes for those.

13 But as Congress stated, as it was
14 reviewing just those class action settlements, and the
15 lead-up to Section 1005 passage, those settlements failed
16 to provide complete relief. Some of payments were eroded
17 by state taxes. Those settlements were limited in time
18 with respect to the discrimination complaints that were
19 addressed to specific periods of time occurring in the
20 late '90s through -- sorry, the late '80s through some
21 time in the '90s. And so there was a discreet period.

22 So it left out a lot of other individuals
23 who would have experienced discrimination.

24 THE COURT: So there have been multiple
25 attempts --

1 MS. SNOW: Yes.

2 THE COURT: -- by Congress to address --
3 and I just -- this term seems to be, permeate a lot of
4 the comments and legislation and talking points that you
5 hear -- systemic discrimination. Right?

6 MS. SNOW: Yes, Your Honor. And I would
7 just like to say that the systemic -- those phrases
8 referring to systemic discrimination are specific to the
9 discrimination occurring at USDA and its farm loan
10 programs.

11 THE COURT: Okay. So there had been
12 multiple attempts by Congress to address systemic
13 discrimination within the USDA?

14 MS. SNOW: Yes.

15 THE COURT: Okay. Mr. Boucek, do you
16 agree or disagree?

17 MR. BOUCEK: With which portion, Your
18 Honor?

19 THE COURT: That there have multiple
20 attempts made by Congress to address what Congress
21 believes, based on the record that Ms. Snow is referring
22 to -- that there has been systemic discrimination, one.
23 And that there have been multiple attempts by Congress to
24 address that type of discrimination.

25 MR. BOUCEK: I agree on both fronts, Your

1 Honor. The USDA has engaged in herculean efforts to try
2 and remedy its past discrimination. And I also agree
3 that the USDA has shown a pattern in the remote past of
4 engaging in discrimination, such that the remedial
5 attempts that were undertaken were appropriate.

6 THE COURT: All right. Ms. Snow, let me
7 go back to you then.

8 What evidence is there of current
9 discrimination? What are you relying on that you believe
10 would demonstrate what I'll call current discrimination?

11 Either the USDA in its current form, and
12 the current programs that it oversees and it administers,
13 that it's engaging in current discrimination?

14 MS. SNOW: So, Your Honor, Congress was
15 attempting to remedy -- it had a compelling interest in
16 remedying the lingering effects of this historic
17 discrimination. So it was not relying on specific
18 present day discrimination occurring at USDA. It was
19 pointing to the historic discrimination, as documented in
20 all of the reports that Congress discussed and which we
21 discussed in our briefing, that shows that discrimination
22 had been going on for decades. And did -- and that did
23 occur up until at least 2011, based on the record that we
24 have.

25 The JL report was produced in 2011. And

1 that discussed how -- it stated in the beginning of that
2 report that the key to understanding its findings was
3 that the inequities faced by socially disadvantaged
4 farmers have over time been systematic and engrained in
5 every day Farm Service Agency operations.

6 That's at page 66 of the report, which is
7 discussing -- that's a portion of the report specifically
8 discussing the Farm Service Agency.

9 THE COURT: But that's, that's a 10 year
10 old report. Right? I'm not saying it's not important.

11 But what evidence is there of current
12 discrimination, or do we have any?

13 MS. SNOW: So the evidence that Congress
14 was relying on was specific to the lingering effects of
15 that discrimination. And this is -- I'll get into that
16 briefly, but I just want to emphasize that this kind of
17 lingering discrimination based on historic acts of
18 discrimination, Congress does have a compelling interest
19 in remedying this as stated -- as the Paradise decision
20 makes clear at 162 through 163, where it was looking at
21 evidence of -- the claim there had been that a police
22 department had discriminated in hiring, its hiring
23 practices.

24 And 12 years later the Court was looking
25 at how those, that discrimination hiring practices had

1 meant that there were virtually no officers in higher
2 ranked positions over a decade later. And that was
3 part -- that was a lingering effect of discrimination in
4 the hiring decisions that had occurred in the past.

5 We have a similar situation here. And the
6 2019 GAL, which Congress discussed, the point draws that
7 link out the most explicitly. On page 29 of that report
8 it discusses how historic discrimination at USDA had
9 caused minority farmers to not have the same
10 opportunities to receive loans, or receive loans on fair
11 terms that would allow them to develop their land at the
12 same rate as, or with the same opportunities as
13 non-minority farmers. And that has led to them having
14 smaller farms generally today.

15 And also, you know, the congressional
16 record points to discrepancies between -- in rates of
17 delinquency and rates of foreclosure between minority and
18 non-minority farmers.

19 As Senator Booker pointed out, black
20 farmers are subject to 13 percent of USDA foreclosures,
21 even though they account for less than 3 percent of
22 direct loan --

23 THE COURT: What time period does that
24 cover? What you're referring to, what time period are we
25 talking about?

1 MS. SNOW: I believe that what he was
2 citing to there, and I can go back and verify for sure,
3 but I believe that that was a current, a statistic that
4 was current as of when they were discussing Section 1005,
5 so earlier this year.

6 And we submitted a declaration from Bill
7 Cobb, from the Farm Service Agency. And his statistics,
8 those statistics -- sorry, that declaration includes
9 statistics that are more updated as of May of this year,
10 and show just the vast disparity in the delinquency rates
11 between minority farmers and white farmers that -- as he
12 pointed out, there are 37.9 percent of black borrowers
13 are --

14 THE COURT: Let me stop you one more time.
15 And I apologize for interrupting, but I'll forget what I
16 want to ask if I don't address it.

17 But everything you mentioned so far would
18 fall into the category of statistical information.
19 Correct?

20 MS. SNOW: That's correct, Your Honor.

21 THE COURT: So everything, whether it's
22 Senator Booker, what you mentioned, or the report that
23 you mentioned, the affidavit that was attached, we're
24 talking about statistical information that's been
25 compiled over a period of years?

1 MS. SNOW: That's correct. And the
2 statistical information kind of illuminates the
3 situation, the present situation today, and shows how the
4 information, which is anecdotal, statistical, compiled in
5 various reports and investigations showing, outlining the
6 historical evidence of discrimination. The statistical
7 disparities today just underscore how that past
8 discrimination is having an ongoing effect.

9 And that is consistent with Croson. Which
10 Croson stated, at page 501, that goes statistical
11 disparities can give rise to an inference of
12 discrimination.

13 And here, because these disparities are
14 linked to specific findings of discrimination in the
15 past, they just underscore the fact that this
16 discrimination is having ongoing effects.

17 THE COURT: Okay. Well, do you want to
18 respond, Mr. Boucek, about current discrimination,
19 whether the government had shown or can show any
20 instances or evidence to support what I'm calling current
21 discrimination?

22 MR. BOUCEK: The government cannot make a
23 showing of current discrimination. The Court's question
24 adequately illustrated that.

25 I understand the government comes back

1 with a mouthful of information when the Court asked that
2 question. But all of that information can be grouped,
3 categorized and swept away under one of two principles.

4 The first is, as the Court alluded to, the
5 government has to show discrimination that is ongoing.
6 It cannot be too remote or in the distant past.

7 In fact, the Sixth Circuit has discounted
8 evidence from 14 years ago. So we at least have that
9 benchmark as being 14 years is just too far in the
10 distant past.

11 And the second point is that the
12 government's evidence can be discounted because it
13 doesn't show intentional discrimination. So even the
14 stuff that is reasonably current, and I'll use that term
15 liberally and generously, but even the stuff that is
16 relatively recent does not suggest intentional ongoing
17 discrimination on the part of USDA.

18 So, for instance, if it's true that
19 minorities are underrepresented in FSA or USDA hires,
20 there is no evidence that that is a product of
21 intentional discrimination.

22 If there are disparities in farm sizes,
23 there is no suggestion that it is attributable to
24 anything that is intentional on the part of USDA.

25 And both the Supreme Court and the Sixth

1 Circuit have been insistent that because race
2 categorizations are so pernicious, the government has to
3 not just show that there are lingering effects, but that
4 they are a product of intentional and ongoing
5 discrimination.

6 And those are the reasons why the Wynn
7 Court discounted everything that she just related as
8 falling short.

9 Again, you cannot take the real
10 discrimination that the governments can show from the
11 remote past, warp past the Pigford settlements, and then
12 try and permit an inference based on ongoing statistical
13 disparities that there are shortcomings today.

14 I'll just briefly address this statistical
15 question, because the Court delved into that too.

16 The Wynn Court found all the statistics
17 that they have cited to you to be insufficient. And this
18 Court should do the -- this Court should find that's
19 inadequate for the same reasons as Wynn.

20 But, in fact, there is only more reason to
21 do it here because of the recent Vitolo opinion. In the
22 Vitolo opinion, a month ago, the government proffered
23 very similar, not the same, but similar source of broad
24 statistical categories.

25 And the Sixth Circuit made short work of

1 it, Your Honor. The Sixth Circuit said, we understand
2 that there are cases out there that address statistical
3 disparities. However, those take place in things like in
4 employment context. Like the city of Memphis's fire
5 fighting decisions, where there is one single decision
6 maker.

7 So if you see glaring statistical
8 disparities when there is one decision maker, well, that
9 actually tells us something. But just like with
10 restaurant owners in Vitolo, the Sixth Circuit said you
11 cannot permit any kind of an inference from something
12 this broad, these broad statistical disparities. And
13 things like farm loan size just tell us nothing. There
14 is too many variables that are responsible for it.

15 So I would go so far as to say that per
16 Vitolo, as a matter of law, that statistical showings that
17 they proffered are just not helpful at all.

18 THE COURT: All right. Ms. Snow,
19 Mr. Boucek has peeled back another layer of the onion.

20 Intentional discrimination. Is that a
21 component of the analysis that the Court needs to engage
22 in?

23 MS. SNOW: As long as the Court concludes
24 that there has been, that there is evidence -- that it
25 was reasonable for Congress to conclude that there is

1 evidence, that there was intentional discrimination by
2 the government unit involved, then, yeah, yes, that is a
3 requirement.

4 But here we do have evidence of
5 intentional discrimination. The evidence of intentional
6 discrimination does not need to be present day. It is
7 clear that it has occurred in the past, and even in the
8 somewhat recent past.

9 But when it comes to the ongoing effects
10 of discrimination, that's a separate question. And the
11 government need not show that there is current specific
12 instances of intentional discrimination before it can
13 take action to remedy the effects of discrimination.

14 THE COURT: Talk about the part that was
15 mentioned as far as in the cases that were mentioned --
16 generally there has been a discussion about a single
17 decision maker.

18 Do you agree with that?

19 MS. SNOW: Yes. And what Croson and
20 Vitolo were referring to with respect to a single
21 decision maker, is that there is a specific government
22 unit, which here would be the Farm Service -- the USDA,
23 and more specifically the Farm Service Agency --

24 THE COURT: The entire USDA?

25 MS. SNOW: There is evidence of a lot of

1 discrimination occurring at all levels of USDA. But we
2 are here focused on the Farm Service Agency, which
3 provides these loans. And there is substantial evidence
4 of intentional discrimination by Farm Service Agency in
5 providing loans.

6 And so if -- Congress could rely on that
7 past evidence of intentional discrimination and the
8 evidence that that discrimination is having lingering
9 effects to take action to remedy those lingering effects.

10 And that is not inconsistent with the
11 Court's conclusion in Wynn. In Wynn the Court stated, on
12 page 16, at note 9, that on -- the Court's concern was
13 with the record as it stands. And it stated that on a
14 more fully developed record the government may be able to
15 establish that despite past remedial efforts, the harm
16 caused by the disgraceful history of the discrimination
17 by the USDA in farm loans and programs is ongoing.

18 So that's focusing on the harm caused and
19 its ongoing affects. And so we don't read the Wynn
20 opinion as requiring specific ongoing intentional
21 discrimination today.

22 THE COURT: You don't read the Wynn
23 opinion that way?

24 MS. SNOW: No, Your Honor. That would be
25 one way of showing that the government has a compelling

1 interest. But another way is to show that because of
2 specific acts of intentional discrimination that have
3 occurred in the past, there are lingering effects that
4 the government has a compelling interest in remedying
5 today. And that's what Congress is focused on.

6 THE COURT: So be sure I'm understanding.

7 So it's your position that at least the
8 Farm Services Administration has engaged in systemic
9 discrimination.

10 MS. SNOW: Yes.

11 THE COURT: Right?

12 MS. SNOW: Yes.

13 THE COURT: That it was intentional?

14 MS. SNOW: Yes.

15 THE COURT: That you're trying to
16 characterize that division as a single decision maker, if
17 I'm reading -- understanding what you are saying.

18 MS. SNOW: Yes, I think that would be
19 similar to a city --

20 THE COURT: And so that, obviously, then
21 that the agency participated in the discrimination.

22 MS. SNOW: Yes.

23 THE COURT: The whole agency, is the only
24 way I know to say it. And by that I mean the Farm
25 Services Administration.

1 MS. SNOW: Yes, that's correct.

2 THE COURT: Do you want to respond to
3 that, Mr. Boucek?

4 MR. BOUCEK: Well, Your Honor, I would be
5 remises if I didn't point out that if USDA was guilty of
6 being such invidious racists that their discrimination is
7 persistent and ongoing, then the solution rights itself.
8 The USDA needs to get rid of the farm service loan agents
9 who are responsible for administering discrimination in
10 its loan policies.

11 But I respectfully submit that the
12 evidence of that showing is just wanting. The Court in
13 Wynn never found it. I've never seen it.

14 It is true undoubtedly that the USDA has a
15 sad history. But the lion share of the government's
16 evidence of intentional discrimination predates the
17 Pigford Settlements. And the evidence of everything that
18 is reasonable current is just weak, anecdotal, doesn't
19 suggest intentional discrimination.

20 I respectfully submit that the Wynn court
21 had it exactly right.

22 THE COURT: All right. Let's see what
23 else do I want to ask you, Ms. Snow. And I -- obviously,
24 I'll give both of you a chance at some point to address
25 anything else that you would like to.

1 Ms. Snow, you said something in your
2 opening remarks about the amount of funds that were
3 available for this program.

4 Are the funds unlimited? Is there no
5 limit on the amount of anticipated funds that are
6 available?

7 MS. SNOW: Yes, Your Honor, that's
8 correct.

9 In Section 1005, Congress appropriated,
10 quote, such sums as may be necessary to remain available
11 until expended, unquote.

12 THE COURT: What does that mean, until
13 it's -- available until expended. That sounds like
14 congressional legalese. But what does that mean? Put a
15 dollar amount on that for me, if you can. Or is there a
16 dollar amount?

17 MS. SNOW: There is no dollar amount.
18 That's the point, Your Honor. Congress just simply
19 allocated such sums as may be necessary to carry out the
20 program.

21 THE COURT: Well, why does it say until
22 expended? How does that factor in -- the amount
23 necessary would seem to say that is no cap. Right?

24 MS. SNOW: Yeah.

25 THE COURT: But then it says until

1 expended. Which would make one think, well, there is a
2 cap here somewhere.

3 MS. SNOW: Your Honor, that language
4 simply indicates that those funds will continue to be
5 available as long as the government needs them to pay for
6 the loans or to pay off the loans under, the qualifying
7 loans under Section 1005. It's not setting any kind of
8 monetary cap or deadline for their -- the point of that
9 phrase is to emphasize that there really is no deadline
10 by which those funds, those unlimited funds need to be
11 expended. That they will be, they will be available to
12 the government to carry out the purposes of the program.

13 And we cited to case law in our brief,
14 which I can cite to you, that is interpreting similar
15 language, similarly for the -- that that there is no --
16 that that type of language does not set a cap on funding
17 or a deadline for its expenditure.

18 THE COURT: All right. I remember your
19 citation there.

20 MS. SNOW: Okay.

21 THE COURT: Mr. Boucek.

22 MR. BOUCEK: Your Honor, we respectfully
23 disagree with Ms. Snow on this.

24 THE COURT: What is your position?

25 MR. BOUCEK: Our position is the funding

1 is limited by the plain text of ARPA. And the Court in
2 Wynn directly addressed this issue, and they've never
3 explained why the Court in Wynn got it wrong.

4 If you are to look at the text of Section
5 1005 it reads, and I quote, there is appropriated to the
6 secretary for fiscal year 2021 -- here's the salient
7 part -- out of amounts in the treasury not otherwise
8 appropriated -- and then we get to the part that they've
9 been quoting -- which is such sums as may be necessary.

10 So the such sums as necessary may be open
11 ended when looked at in a vacuum, but it's qualified by,
12 out of amounts in the treasury not otherwise
13 appropriated, which is a finite amount of funds.

14 I further point out, Your Honor, that if
15 Congress had really given an unending, open ended funding
16 mandate, we would have seen that discussed rather
17 publically. And on the contrary, until the government
18 became concerned with these injunctions, all of the
19 public statements out of the USDA was that this was a
20 limited pot of funds and that it was 4 billion.

21 If I may switch to my monitor for just a
22 momentarily?

23 THE COURT: All right. Mr. Bryson, will
24 you switch us over, I guess.

25 MR. BOUCEK: I'm showing the Court a press

1 release from USDA from about March 10th, I believe it is.
2 I would ask the Court to take judicial notice of it.

3 But the Court can look at it right here,
4 first bullet point. 4 billion toward debt relief for
5 socially disadvantages farmers to pay off burdensome
6 debts.

7 So the idea that these were unlimited and
8 not, rather, a specific number, is a new founded position
9 by the government and is contradicted by their more
10 timely pronouncements during the time.

11 I respect submit, Your Honor, all of this
12 is somewhat an academic exercise when considering whether
13 or not to grant the preliminary injunction.

14 In the Sixth Circuit the law is clear that
15 the intangible harm of an equal protection violation is
16 sufficient to constitute an irreparable harm, which was
17 not the case in 11th Circuit, which is why an injunction
18 is only more warranted here.

19 However, the Court should certainly raise
20 an eyebrow at the patently incredible claim that Congress
21 intended to just give an open ended funding mandate.

22 THE COURT: All right. Ms. Snow, I'll
23 give you an opportunity.

24 It says what it says. You see it, as well
25 as I do.

1 You disagree with that statement, or did
2 someone misunderstand or --

3 MS. SNOW: I do disagree with the
4 statement, Your Honor. That is providing an estimate of
5 the amount of money that it will take to pay off -- you
6 know, with the current date that USDA had at the time the
7 statement was made, that it would take, you know,
8 roughly -- it would cost roughly \$4 billion to pay off
9 the qualifying loans held by socially disadvantaged
10 farmers.

11 This statement does not indicate anywhere
12 that USDA believes that Congress has set a cap on the
13 funding available. And importantly, the estimate may
14 change, and this \$4 billion number is -- that was based
15 on USDA's calculations at the time. But it's in the
16 process of identifying still all of the qualifying loans
17 under the statute, and how much money -- the amounts of
18 those loans, and how much money it will take to pay them
19 off.

20 THE COURT: So this is just an estimate of
21 the amount of qualifying -- what they anticipate will be
22 the number amount of qualifying loans?

23 MS. SNOW: That's correct, Your Honor.

24 THE COURT: All right. Well, let's go
25 back to something. This is going to be critical to the

1 decision here.

2 Obviously, we're in the Sixth Circuit.

3 And Vitolo is a recent decision out of the Sixth Circuit.

4 If systemic racism was not a compelling
5 justification in Vitolo, or the restaurant relief, why is
6 it not equally inadequate as a justification in this
7 case?

8 MS. SNOW: Your Honor, the evidence in
9 Vitolo was very different from the evidence that we have
10 here.

11 And in Vitolo the Court was not analyzing
12 the ongoing effects, the lingering effects of
13 discrimination, it was looking to the government's
14 asserted interest in remedying specific discrimination
15 that was happening present day.

16 And the record just did not support the,
17 Congress's compelling interest in that case. So that's
18 the key difference.

19 And with respect to the record, the Vitolo
20 Court found that Congress was generally relying on
21 discrimination society wide, and that Congress was just
22 -- was citing more general statics that were not specific
23 to the restaurant industry or a specific government
24 entity that had committed discrimination intentionally.

25 And here we have an entirely different

1 record. Congress was looking specifically to the Farm
2 Service Agency. And it had specific evidence that there
3 had been intentional discrimination in the Farm Service
4 Agency.

5 So the record is just entirely different
6 here. Congress was not citing discrimination society
7 wide to justify this program, it was looking specifically
8 to the Farm Service Agency.

9 THE COURT: Okay. Do you want to respond?

10 MR. BOUCEK: Yes, Your Honor. I think
11 it's important to point out there is kind of two
12 components to the Court's question.

13 The first is the broad justification of
14 remedying societal discrimination. The Courts have been
15 very clear, both the Supreme Court and the Sixth Circuit,
16 that just generally remedying societal discrimination is
17 not good enough. The Court has, the Supreme Court has
18 given a very narrow window to use past discrimination as
19 a justification for a race-based program.

20 Obviously, if the government had a
21 compelling interest in addressing societal
22 discrimination, race-based policies would be the reality
23 of the every American policy. The Courts have been very
24 sensitive to say we are not going to allow that. We are
25 just going to allow a very narrow window that is subject

1 to many of constraints we have talked here today.
2 Intentional discrimination within the agency, and so on,
3 and so on.

4 So Vitolo clearly said that remedying
5 societal discrimination is not a compelling interest,
6 period. Then the Court in Vitolo turned to the question
7 of whether or not the government had made the requisite
8 showing that it needed to make to show that it was, that
9 it was remedying past discrimination on the part of the
10 specific industry in question. Which is a permissible
11 interest.

12 Then the Court looked at truly a different
13 evidentiary record, but the same kind of evidence, and
14 said that's not good enough. So there is a little bit of
15 a bait and switch that goes on here with remedying
16 societal discrimination.

17 The evidence that has been proffered truly
18 does show that there has been a history of
19 discrimination. But that does not rise to the level of
20 establishing a strong basis in evidence for the actual
21 legitimate compelling interest, which is remedying past
22 discrimination that remains stubborn, persistent,
23 ongoing, that they had an intentional hand in. And
24 that's where the shortcoming comes in.

25 So, respectfully, Vitolo did arrive at the

1 conclusion that societal discrimination was not good
2 enough, and that dismissed the evidence that they had
3 supported the actual justification that they could rely
4 on. And the Court should do the same here.

5 I think that there is -- much like with
6 the number, there is a variance between the government's
7 legal position and its public pronouncements. And we
8 cited a number of these statements in our brief.

9 But to the entire world, defendant Vilsack
10 and the agency are going around saying, this is intended
11 to achieve equity and remedy systemic racism. That's
12 what they're saying. We've put any number of quotes in
13 there. Most recent pronouncement from defendant Vilsack
14 attacking the litigation said it was pretty clear what it
15 had to achieve, why they had to discriminate on the basis
16 of race. And we quoted this in our brief. But he guess
17 on to say it was addressing the public perceptions of
18 systemic racism.

19 Now the government are very good
20 attorneys. They know that that is, no way that that is a
21 justification that will pass constitutional muster. But
22 the government's justifications have to be sincere under
23 strict scrutiny.

24 And so the variance between the
25 government's stated positions in court, and the stated

1 pronouncements of defendants when they're talking to the
2 public or Congress, should trigger a scepticism from the
3 Court about the sincerity of the government's proffered
4 justifications.

5 I think the Court in the Sixth Circuit,
6 what it said was exactly correct by implication, which is
7 that your evidence supports a systemic racism approach,
8 but that's not a compelling justification. I think the
9 same is true here today.

10 THE COURT: I'll let you respond, Ms.
11 Snow.

12 But would you agree that there is some
13 disconnect between the public statements and what
14 Mr. Boucek referred to?

15 There appears on the surface to be. I'm
16 just wondering if you agree or disagree that there is
17 some disconnect, I'll call it, between the public
18 pronouncements and the position that's being taken in
19 these legal proceedings.

20 MS. SNOW: Your Honor, I disagree that
21 there is a disconnect.

22 If you look at those statements that are
23 being cited by Secretary Vilsack, he is referring to
24 systemic discrimination, but he is referring to systemic
25 discrimination at USDA in USDA Farm Service Agency

1 programs. He is not referring to systemic discrimination
2 society wide. And that is the key difference between
3 this case and Vitolo.

4 In Vitolo there was an absence of evidence
5 that was specific to the restaurant industry, specific to
6 the Small Business Association that was providing this
7 program. Here we have specific evidence that is directed
8 to Farm Service Agency, and Secretary Vilsack's
9 statements are specific to that as well.

10 Just because he uses the term "systemic
11 discrimination" does not mean that he is talking about
12 society wide discrimination. Again, if you look at
13 the -- if you look at those quotes in their context, he
14 does point back directly to USDA. So we don't see any
15 inconsistency.

16 THE COURT: Did Congress consider all this
17 plethora of information that you are now relying on? Did
18 Congress actually consider all of that in enacting the
19 legislation?

20 MS. SNOW: It did, Your Honor.

21 In particular, the floor statements of
22 Senator Booker and Stabenow and House Chairman David
23 Scott. They go through all of this evidence in detail.

24 When we were -- the government pulled from
25 those statements and the studies that they cited in

1 preparing this briefing and explaining the findings in
2 those investigations and reports that Congress
3 specifically cited to.

4 So all of this evidence was before
5 Congress. They were drawing from all of these reports
6 and concluding they had a compelling interest in adopting
7 this program.

8 THE COURT: Do you agree or disagree?

9 MR. BOUCEK: I disagree.

10 I suppose it depends on what you mean by
11 "Congress". The best evidence of what Congress
12 considered is contained in the findings. There really
13 were no findings in ARPA that addressed Section 1005 or
14 farm loans or any of those kind of issues. That's really
15 not surprising. ARPA was a pandemic relief bill.

16 Really what Section 1005 is is derivative
17 of Senate Bill 278, which was geared towards this exact
18 issue. In fact, the government refers to Senate 278 as
19 the predecessor bill in its brief. And I agree, I think
20 that's accurate. That did contain findings.

21 In all of the findings, all of the
22 findings in Senate Bill 278 addressed system wide
23 systemic racism issues that fall short of the showing
24 about systemic intentional racism.

25 And to the Court's question in particular,

1 virtually none of the government's evidence was
2 referenced in the findings for Senate 278.

3 I think the only one that is possible is a
4 2019 GAL Report. And the GAL report from 2019 does not
5 make a finding of intentional racism, and it's just sort
6 of weak anecdotal second-hand information.

7 And the Wynn report specifically addressed
8 the 2019 reports. It said this isn't nearly good enough.
9 And even if we believed everything in here, it doesn't
10 recommend a broad wholesale approach of forgiveness of
11 farm loans as the approach.

12 So, you know, it's just another instance
13 of the evidence that was actually considered falling
14 short of showing recent intentional discrimination on the
15 part of USDA that corresponds with the relief in Section
16 1005.

17 THE COURT: Ms. Snow.

18 MS. SNOW: Your Honor, what is important
19 in what was considered in leading up to the enactment of
20 the Section 1005, and not a predecessor bill that was not
21 adopted. The findings in the predecessor bill do show
22 that Congress had the same compelling interest in mind.
23 But when it was considering Section 1005, it was
24 reviewing -- Congress reviewed a substantial amount of
25 evidence that we have gone through in our brief. And

1 those statements by senators are probative of what
2 Congress was considering.

3 So in Croson -- I believe in plaintiff's
4 brief they state that floor statements are not probative.
5 But Croson states that statements from officials are not
6 probative when they are not supported by evidence. Here
7 they are supported by evidence. And so those statements
8 are probative of what Congress had in mind, what it
9 considered when it was enacting Section 1005.

10 THE COURT: Okay. What race-neutral
11 alternatives did the government consider?

12 MS. SNOW: Well, significantly, Your
13 Honor, the most recent race-neutral form of relief that
14 Congress had provided in order to address the effects of
15 the pandemic was recent -- well, agricultural funding
16 that addressed -- that was not pandemic related, that was
17 related to tariffs that were having a -- retaliatory
18 tariffs from China that were affecting farmers. Congress
19 provided some funding to assist farmers with that.

20 But then recently after that, in
21 additional COVID relief that Congress provided to assist
22 farmers as well, both of those funding measures went
23 largely to non-minority farmers. And Congress had an
24 interest in, when -- upon reviewing these reports,
25 showing that the majority of its funding did not reach

1 minority farmers, despite the fact that they were facing
2 a disproportionate need, they were disproportionately
3 affected by the pandemic, congress concluded that it had
4 a compelling interest, and kind of reversing the way that
5 its disproportionate funding had exacerbated the effects
6 of the pandemic, perpetuated the lingering effects of
7 discrimination, made worse by the pandemic --

8 THE COURT: But what race-neutral
9 alternatives? Can you be specific? I'm not following
10 your argument here.

11 Think about the question. Race-neutral
12 alternatives. What specifically are race-neutral
13 alternatives that Congress considered?

14 That's what I'm trying to focus on.

15 MS. SNOW: Right. Yes, Your Honor.

16 So Congress had considered the ways that
17 its other efforts to kind of remedy discrimination toward
18 minority farmers had come up short. And then considered
19 the failures of its prior relief, COVID and agricultural
20 relief, to reach minority farmers. Which was -- a
21 provision of that relief was race neutral, but it went
22 largely went to non-minority farmers. And so that was
23 not addressing the needs of minority farmers.

24 THE COURT: But didn't the Wynn decision
25 sort of address that from a different standpoint as far

1 as farm size and crops and so forth? Wasn't that the
2 analysis that -- out of the Middle District of Florida?

3 MS. SNOW: Yes, Your Honor, that was the
4 conclusion of Wynn.

5 But, respectfully, Your Honor, we disagree
6 with that, with the Court's reasoning there.

7 The 2019 GAL report kind of -- which I
8 referenced earlier, discusses how the effect the
9 lingering -- the ongoing discrimination at USDA had
10 prevented farmers from developing, or minority farmers
11 from developing their farms with the same opportunities
12 as non-minority farmers, which has led to them having
13 smaller farms today. And which explains, you know --
14 that shows that it's not just the neutral fact that
15 funding went to smaller farms, it's smaller -- minority
16 farmers generally had smaller farms, in large part
17 because of this discrimination from the past, which the
18 GAL report of 2019 draws that link.

19 And similarly, Senator Stabenow cited a
20 study from Tufts University that was discussing just the
21 land loss over time over the last century. In
22 particular, black farmers losing 80 percent of their land
23 over the last century, and how that represented more than
24 \$120 billion in lost opportunities.

25 So these losses over time have accrued so

1 that minority farmers generally have smaller farms,
2 diminished opportunities. And that explains, that
3 provides a link between the historic discrimination and
4 the way that it affects farmers today. And why the
5 funding, if it went to mostly larger farms, is due in
6 part to discrimination.

7 Lastly, there is a letter that was
8 introduced into the congressional record from
9 agricultural academics that also are supporting,
10 providing evidence for this position that the effects of
11 discrimination, decades long discrimination, which has
12 affected minority farmers for generations in their
13 ability to develop land, has meant that they have been
14 deprived of the same opportunities that go to larger
15 farms generally, and USDA programs targeting larger
16 farms.

17 THE COURT: Did Congress consider
18 race-neutral alternatives?

19 MR. BOUCEK: No, Your Honor. And nor does
20 the government ever cite and instance where they did so.

21 And, of course, they didn't. This is a
22 bill about pandemic relief that was passed through
23 reconciliation.

24 And before the government can justify a
25 blunt instrument, like Section 1005, the Supreme Court

1 has said you have really got to go through very careful
2 consideration to show that there is nothing you could
3 have done short of making race at the fore when you
4 discriminate against Americans in the dissemination of a
5 government program.

6 And here I'll point out, Your Honor, that
7 a program like Section 1005, I would go so far as to say
8 it's entirely unprecedented in affirmative action
9 jurisprudence. I don't know that any of the other cases,
10 even in the heyday of affirmative action, considered such
11 a program that would so wildly and glaringly based on
12 race for a government benefit.

13 The government's evidence falls way short
14 of showing a compelling interest. But that's not
15 pertinent to the Court's narrow tailoring analysis.

16 The narrow tailoring analysis addresses,
17 how did you choose to achieve these goals? And here the
18 government has given us two general justifications.

19 The first justification is pandemic
20 relief. Here Vitolo is directly on point. In Vitolo
21 they pointed out that it's really true that minorities
22 had been left out of prior pandemic relief efforts, then
23 the thing to do would be to just give priority to
24 everybody who had been left out of prior pandemic relief
25 efforts.

1 That is, obviously, the most narrowly
2 tailored way of achieving that goal. Congress didn't
3 choose it. There is no good reason to have not chosen
4 that, if that was the goal. And the government succeeds
5 only in proving that they did not consider that goal when
6 it points out that minority groups were differently hit
7 by the pandemic.

8 That may or may not be true. But that has
9 nothing to do with why didn't you just choose to give
10 people who had been left out of prior pandemic relief,
11 have priority access to the program.

12 Nor is it true that every minority who
13 would have been left out of the prior pandemic relief has
14 a farm loan. The better way to do it would be to say
15 everybody, irrespective of whether you have a farm loan,
16 who was left out of prior pandemic relief, can go have a
17 cash of \$2000, or whatever it would be. All of those are
18 more tailored ways of achieving the goal.

19 And then when -- again, Vitolo addressed
20 that directly.

21 And when it comes to the more slippery
22 goal that they have articulated of remedying past
23 discrimination, again, we have the Pigford settlements.

24 In the other cases the government was much
25 more specific in it's arguments about why the Pigford

1 settlements were inadequate.

2 The government has not been as specific in
3 its brief before this Court. Probably because the Wynn
4 Court was so dismissive of the evidence that they had
5 proffered that the Pigford settlements were weak.

6 But even if we concede that it's true that
7 the Pigford settlements left somebody out because of
8 state taxes, or because of statute of limitations, or for
9 whatever issues, the thing to do would be to just find
10 the people who were excluded from the Pigford settlements
11 and give them an award. Or find the people who got
12 settlement awards and make them whole by paying whatever
13 they owed in state taxes.

14 But giving farm loan relief to current
15 recipients is so wildly out of whack with that goal --
16 you might be a young farmer whose farm practice totally
17 antedates or totally postdates any of the overt farm loan
18 discrimination that the government has identified.

19 And this says nothing about the racial
20 categories that the government has broadly swept under
21 this umbrella.

22 I mean, most of the government's evidence
23 addresses it's historic discrimination of
24 African-American farmers, which is truly odious and
25 noxious. But the government's evidentiary showing for

1 Hawaiians or Natives, it's so weak as to honestly almost
2 be called not even there.

3 The Wynn Court addressed that as well, as
4 well as Vitolo granted on a different evidentiary record.

5 But, you know, Your Honor, I just think
6 that the tailoring aspect of this makes this case an
7 absolutely slam dunk. Which is why I go so far as to say
8 plaintiff is not likely to prevail, I think plaintiff is
9 certain to prevail based on the record that we have now,
10 which contains no real meaningful evidence.

11 MS. SNOW: Your Honor, I think when it
12 comes to the narrow tailoring analysis it's important to
13 remember the purpose that Congress had in mind, which was
14 to provide timely and meaningful relief to minority
15 farmers in the midst of a pandemic that had exacerbated
16 the disproportionate opportunities that they already,
17 that they had before the pandemic.

18 The pandemic only exacerbated the
19 lingering effects of discrimination that had placed
20 minority farmers at a disadvantage before. And it was
21 that purpose that Congress had in mind when it designed
22 Section 1005. It was targeting those, the
23 discrimination -- the effects of discrimination.

24 And but it was trying to do so in a timely
25 way. And so the program is narrowly tailored to

1 providing that kind of timely relief. As in the Supreme
2 Court's decision in Paradise, which approved of a one for
3 one hiring and promotion remedy as a need which was
4 designed as a, quote, ephemeral remedy to address a
5 emergency situation where, you know, the prior efforts at
6 resolving or remedying discrimination had come up short.

7 This is a similar situation where the
8 lingering effects of discrimination have just been
9 exacerbated by a global pandemic that put minority
10 farmers at risk, at great risk of foreclosure, facing
11 higher rates of delinquency. And so Congress --

12 THE COURT: All right. Let me interrupt
13 you one more time, because this is a another question I
14 have written down.

15 Does the program target farmers and/or
16 ranchers who suffered economic pain during COVID-19 or
17 those who actually contracted COVID-19?

18 Does the program itself target farmers and
19 ranchers who suffered economic pain during COVID-19,
20 that's one part of it, and/or those who actually
21 contracted COVID-19?

22 Does it zero in on those two groups?

23 MS. SNOW: Your Honor, it doesn't. It
24 focuses on minority farmers who have USDA direct or
25 guaranteed loans.

1 THE COURT: That's the only requirement,
2 is minority farmers who have -- say what you just said
3 again. Repeat that.

4 MS. SNOW: Minority farmers who have
5 direct or guaranteed USDA loans. So --

6 THE COURT: So this was a pandemic bill,
7 right, a COVID relief bill?

8 MS. SNOW: That's correct.

9 THE COURT: And in Section 1005 targeted
10 those who just had USDA loans?

11 MS. SNOW: That's correct, Your Honor.

12 And the reason for that is, again,
13 Congress was acting in emergency situation, trying to
14 provide relief to farmers as quickly as possible. And so
15 it was doing what it had in its power to do to provide
16 relief on a timely basis.

17 And so farmers who have direct or
18 guaranteed loans with USDA, first of all, are those who
19 have been, belong to groups that have been victims of
20 discrimination and are experiencing its lingering
21 effects. So that makes sense that Congress would have
22 targeted those farmers having -- but --

23 THE COURT: So they would be entitled to
24 debt forgiveness, even though they may not have been
25 affected in any way by the pandemic?

1 MS. SNOW: Your Honor, Congress had before
2 it information or evidence showing that minority farmers
3 as a whole have been aversely --

4 THE COURT: Well, I know there is some --
5 that sort of goes back, I think, to maybe what we
6 addressed earlier about the statistical information that
7 you pointed out to the Court.

8 But my point is, this relief bill in this
9 particular section, 1005, really doesn't take into
10 consideration, does it, or am I missing something here,
11 how the pandemic has impacted these particular group of
12 farmers who had loans through USDA?

13 MS. SNOW: So it does in the -- to the
14 extent that Congress was also looking at how its prior
15 more recent funds had largely been, or gone to
16 non-minority farmers. And so because as a whole minority
17 farmers had been left out of those recent funding
18 efforts, based on that evidence, and in this emergency
19 situation, Congress was using the tools that it had to
20 provide relief expediently to minority farmers.

21 THE COURT: Okay. Again, just move on
22 down the line, my list.

23 The plaintiffs made the argument, Ms.
24 Snow, that if the Court doesn't intervene, that the
25 plaintiff cannot avail himself of damages in light of

1 sovereign immunity and the plaintiff's inability to seek
2 damages.

3 Do you agree or disagree?

4 MS. SNOW: We disagree, Your Honor.

5 Damages are not at issue here, because
6 plaintiff has not made a claim for damages. He's seeking
7 forward-looking injunctive relief.

8 Under Supreme Court case law governing the
9 appropriate remedies in equal protection cases, when it
10 comes to the benefits available under a statute, Courts
11 do have power to enter remedies that would expand the
12 class of recipients under the statute.

13 We cited Sessions v Morales-Santana in our
14 brief, which summarizes the case law on this point.

15 In Morales-Santana, the Supreme Court
16 stated that when the right invoked is equal treatment,
17 the appropriate remedy is to mandate equal treatment,
18 assuming the Court -- if the Court were to find this is
19 unconstitutional -- and that mandate of equal treatment
20 can be accomplished in one of two ways. Either
21 withdrawing benefits from the favored class, or extending
22 benefits to the excluded class.

23 And that depends on the legislature's
24 intent. So here, based upon this case law, the Court
25 does have the power to expand the class beneficiaries if

1 it determines that that is appropriate --

2 THE COURT: That's not what Congress
3 intended, was it?

4 MS. SNOW: It is, Your Honor.

5 Congress would have intended -- so this
6 analysis looks to what the effect would be of withdrawing
7 benefits to a class that Congress intended to protect.

8 As the Supreme Court in Califano v
9 Westcott also analyzed -- you know, in that case the
10 Court approved an order that extended Social Security
11 benefits to an otherwise excluded class, in large part
12 because it found that an injunction suspending the
13 program's operation would impose hardship on
14 beneficiaries whom Congress plainly meant to protect.

15 And here, the same result would follow.

16 Congress plainly meant to protect socially
17 disadvantaged farmers, those who are in need of this
18 relief. And an injunction completely suspending the
19 allocation of those benefits would impose substantial
20 hardship.

21 And given the emergency nature of this
22 relief, Congress's intent that it get to all of those who
23 need it, in part, which is also shown by the fact that it
24 did set, appropriate unlimited funds --

25 THE COURT: Mr. Holman is not a socially

1 disadvantaged farmer, is he? He doesn't fall in that
2 category.

3 MS. SNOW: No, Your Honor.

4 And the way that -- if you -- in Califano
5 v Westcott, it illustrates how the Court would order this
6 kind of relief, if it were to conclude the program is
7 unconstitutional. In that case, the statute provided
8 Social Security benefits to families within -- if the
9 male parent was unemployed.

10 And so the Court concluded that that was
11 unconstitutional, and the appropriate remedy would be to
12 expand the class of beneficiaries. And it do so by
13 striking language in the statute that would limit the
14 beneficiaries -- that would allocate funds based on
15 gender.

16 And so the Court would have in its
17 power -- again, we would like to brief remedies in the
18 future, if the Court were to determine that this is
19 unconstitutional --

20 THE COURT: What you are saying is
21 basically the Court would have to rewrite the
22 legislation.

23 MS. SNOW: It would not be rewriting, Your
24 Honor. Because, again, this is just getting to the issue
25 of remedy and what Congress's intent would be.

1 And in Califano v Westcott Supreme Court
2 case it approved of a remedy that would involve striking
3 specific language in order to expand the class of
4 beneficiaries, because that is in line with Congress's
5 intent. And it would protect, it would protect those who
6 Congress plainly meant to protect within the statute.

7 And so this type of remedy is entirely
8 consistent with Supreme Court case law and mandated by
9 Supreme Court case law that the Court consider Congress's
10 intent in fashioning the appropriate remedy. And the
11 appropriate remedy here would be to expand the class of
12 beneficiaries. That would be more in line with
13 Congress's intent, than just withdrawing it entirely.

14 MR. BOUCEK: Well, Your Honor, again we
15 respectfully disagree. This Court cannot grant funding
16 to Mr. Holman or anybody else even if plaintiff prevails.

17 To just briefly address her first point,
18 which was that plaintiff did not request damages because
19 he just requested forward-looking relief. That is
20 precisely because sovereign immunity precludes us from
21 requesting damages, and we are not in the habit of asking
22 the Court for remedies that the Court cannot award. So
23 we were left with asking for forward-looking relief. And
24 we came to court promptly to ask for a preliminary
25 injunction to halt this program for ever going into

1 effect.

2 To more directly address whether or not
3 the Court can award funding to Mr. Holman, or other
4 similarly situated plaintiffs, the Court cannot.

5 As the Wynn Court correctly found, the
6 Court cannot rewrite Section 1005 so as to include non
7 socially disadvantaged farmers.

8 The clear and manifest point of Section
9 1005 was based on race. And so if the Court is to come
10 back and say that all races, or potentially some races,
11 but not others, can access these funds, that's really
12 doing Congress's job for it.

13 And Ms. Snow is a very capable attorneys.
14 But I dare say that it's not within any attorney's skill
15 set to predict what Congress actually intended or would
16 have done under different circumstances.

17 With respect to the Westcott decision that
18 she cited, the Wynn Court directly addressed it and said
19 that the government had its understanding of that case
20 wrong. That concerned a case where the plaintiff was
21 coming and saying, I am entitled to these benefit per the
22 term of the statute and the regs.

23 And then Court awarded -- said, you're
24 right, and, therefore, said you are eligible for these
25 programs.

1 That's very different from what we have
2 here. As the Court pointed out, Mr. Holman is not
3 eligible for loan relief under Section 1005. So for the
4 Court to say you have funding available would call into
5 very serious questions about whether or not the Court is
6 awarding damages or what that would look like.

7 And that would be, implicate things like
8 the apportionments clause, which again was addressed by
9 the Court in Wynn. Because, obviously, if we're going to
10 forgive every single farm loan that's eligible out there,
11 irrespective of race of the farmer, that's going to be a
12 very different budgetary obligation for the government
13 than the one that Congress actually approved of.

14 And that runs afoul of the Constitution.
15 This Court cannot apportion funding.

16 Finally, Your Honor, I'll close on the
17 point by saying, the ultimate remedy that this Court
18 orders, whether it's funding or not, is irrelevant.

19 In the Sixth Circuit an equal protection
20 harm is an irreparable harm. So it doesn't matter
21 whether or not he can get funding later on, he faces an
22 immediate irreparable harm.

23 Again, that is distinct from the 11
24 Circuit, because that is the law of the land in the Sixth
25 Circuit.

1 Moreover, the Court's job at preliminary
2 injunction stage, is doesn't have to fashion the ultimate
3 remedy or decide this thorny question of what the
4 ultimate remedy is, we can do that another day. The
5 Court's job at the PI stage is just to preserve the
6 status quo.

7 The status quo is that nobody was getting
8 funding. And stated differently, if the Court enjoins
9 any payments, and plaintiff is wrong about the Court's
10 ability to award funding, the Court can still come back
11 again in this case and just decide that that's the
12 appropriate remedy and we are going to award funding.
13 But the opposite is not true.

14 If the Court limits funding to just the
15 plaintiff, or just says we're going to set aside funds
16 for the plaintiff, and plaintiff is right about the
17 funds, either that they're disappearing on that the Court
18 can't do it, then the Court will be left in the
19 unfortunate position where they have to figure out a way
20 to get back all the funding that has been sent out to the
21 socially disadvantaged farmers. That, obviously, is
22 going to be a much more disruptive way of trying to
23 fashion a remedy.

24 So the appropriate thing to do here is to
25 preserve the status quo, and that's just halt these

1 payments from going out.

2 THE COURT: I've got -- let me tell both
3 of you, I've got just two or three more questions, then
4 I'm going to take a break and give both sides an
5 opportunity to make any closing remarks you would like to
6 make. Or if there is any areas that you're not
7 comfortable that I delved into deep enough and you want
8 to address those, then you'll be giving an opportunity
9 to.

10 Ms. Snow, what discrimination have current
11 farmers with loans suffered? What discrimination have
12 current farmers or farmers with current loans -- maybe
13 that's better said.

14 What discrimination have farmers with
15 current loans suffered?

16 MS. SNOW: Your Honor, the farmers with
17 current loans may have been suffering from discrimination
18 or -- they may have suffered specific acts of
19 discrimination or experiencing its lingering effects.

20 But the farmers -- it's well documented in
21 the history of, in the reports before Congress that they
22 discussed that discrimination in the administration of
23 the farm loan programs would affect the terms of the
24 loans that were given out and the amounts that they were
25 provided in, and the time lines in which they were

1 provided.

2 So, for instance, the CRAT report details
3 this very specifically, many complaints by all minority
4 farmers falling into the racial groups that are included
5 in USDA's definition of socially disadvantaged farmers.
6 All of these different groups have complained of
7 receiving loans on a delayed basis at a time where it was
8 just too late to be useful for that season's crops. So
9 they lost out on the economic benefits of obtaining the
10 loan to be able to produce that season's crop.

11 A lot of them complained of receiving
12 loans in smaller amounts than non-minority farmers, or
13 receiving loans in specific amounts and then having them
14 arbitrarily reduced, or the terms, the repayment terms
15 changed and arbitrarily accelerated.

16 There is also specific accounts of
17 farmers -- this is also detailed in the Pigford
18 litigation -- farmers discussing receiving loans with
19 supervised accounts. Which meant that the county
20 commissioner, who was most likely white, had to sign off
21 on any, you know, any use of the loan before the minority
22 farmers could actually make use of it.

23 That's explained in the CRAT report in the
24 Pigford litigation.

25 And then finally, not receiving loan

1 servicing options if they were at risk of default or they
2 were not extended the same kind of options that
3 non-minority farmers received.

4 THE COURT: All right. Do you want to
5 respond?

6 MR. BOUCEK: Briefly, Your Honor.

7 The Court's questions is what evidence is
8 there that current farm loan holders, holders of farm
9 loans are victims of discrimination. And there isn't.

10 My first point is that, in fact -- I think
11 this goes directly to the tailoring analysis -- the
12 biggest victims of USDA's historic discrimination
13 probably don't hold farm loans any longer. They are
14 people who probably lost the farm. And those people are
15 not addressed in any way by this program. Which is one
16 of the ways that the Wynn Court said that the program is
17 widely under inclusive, which is one of the ways of
18 showing it's not tailored.

19 The second point is that the government's
20 evidence that Ms. Snow points out is weak and anecdotal.
21 It was all discounted by the Wynn Court. When they talk
22 about the CRAT report, what they are really talking about
23 are these vague, second-hand accounts that certain
24 minorities feel, quote, stereotyped when they deal with
25 farm service agents. That's not the sort of hard

1 evidence that can merit a race based preference.

2 Obviously, if it remains the case in 2021
3 that the USDA is employing discriminatory loan service
4 agents, the appropriate remedy is for USDA to get rid of
5 those loan service agents immediately and start dealing
6 one on one on an individualized case with the victims of
7 those discriminatory loan practices.

8 The government is not going to tell you
9 that that's happened, because they don't have evidence of
10 it.

11 THE COURT: Ms. Snow, will persons who
12 receive loan forgivenesses under ARPA be eligible for
13 future Farm Service Administration loans?

14 MS. SNOW: Your Honor, those who are
15 entitled to receive debt relief are eligible for future
16 loans. This is not debt forgiveness, as that is defined
17 by the statute, because it does not result in a loss to
18 the secretary, which is a requirement for -- under the
19 statute, debt forgiveness is by definition modifying or
20 altering a loan in a way that results in a loss to the
21 secretary.

22 THE COURT: I think the terminology is
23 debt relief versus debt forgiveness. Right?

24 MS. SNOW: Yes. We have been using the
25 term debt relief as a way of distinguishing it.

1 So because that provision that applies to
2 debt forgiveness that would otherwise provide or trigger
3 eligibility borrowers to receiving future loans, that's
4 just is not applicable here, because this doesn't fall
5 within the category of debt forgiveness under the
6 statute.

7 So, yes, those who receive debt relief
8 under Section 1005 are eligible for future USDA direct or
9 guaranteed loans.

10 THE COURT: Do you agree or disagree?

11 MR. BOUCEK: We disagree. But it's not
12 necessary for the Court to resolve in the preliminary
13 injunction stage. We didn't cite that as a basis of
14 plaintiff's likely harm for the injunction.

15 This may be one of those things that
16 require a little bit of evidence to -- we just cited it
17 solely for the basis of pointing out that when it comes
18 to harm to others, by actually entering an injunction the
19 Court may actually be doing even the socially
20 disadvantaged farmers a favor, because it may be stopping
21 them from unwittingly agreeing to debar themselves from
22 future loans.

23 But, again, that's not a requirement for
24 the Court to resolve the PI.

25 THE COURT: All right. Tell you what,

1 let's take about a 10 minute recess. Give you an
2 opportunity to sort of pull your final thoughts together.
3 And if there are any salient points that you definitely
4 want to make, then we'll give you the opportunity to do
5 so.

6 All right. Mr. Bryson.

7 (Recess taken.)

8 THE COURT: One final question that one of
9 my law clerks brought up, and it seemed like a good
10 question to me. I'll ask that, then I'll hear from both
11 sides.

12 Is there any kind of moratorium on
13 foreclosures currently?

14 MR. BOUCEK: I assume the Court's talking
15 about the eviction moratorium. In fact, our organization
16 has been involved in some of that litigation.

17 So multiple courts have found that the
18 CDC's eviction moratorium was either illegal or
19 unconstitutional. There has been a variety of rationales
20 proffered. My understanding is that the CDC is still
21 enforcing the eviction moratorium, irrespective of the
22 Court's findings.

23 THE COURT: Across the board? I mean, the
24 one that always, that I'm most familiar with would be
25 like foreclosure on evictions, that you can't evict

1 tenants or whatever.

2 MR. BOUCEK: Correct. I think that I'm
3 accurately stating that. I don't know if there is some
4 variance between the states. And I hope the attorneys
5 will correct me if I'm wrong here.

6 MS. CALKINS: I can clarify that for the
7 Court, because I was local counsel on that case.

8 Judge Norris issued an order that enjoined
9 the enforcement of the CDC order in this district.

10 THE COURT: But did that just apply to
11 landlord evictions? Isn't that what that case was about?

12 MS. SNOW: Yes. So are you asking about
13 foreclosures on farmland?

14 THE COURT: Nonpayment of farm loans,
15 yeah.

16 MS. SNOW: Yes. So currently USDA is not
17 foreclosing on loans, on USDA loans. And that's specific
18 to USDA direct loans.

19 With respect to loans that USDA
20 guarantees, those are provided by private lenders and
21 then guaranteed by USDA. For those loans, USDA has
22 encouraged private lenders not to initiate any
23 foreclosures, but it can't guarantee that lenders won't
24 do so.

25 And so with respect to, only to direct

1 loans, there is currently -- currently USDA is just not
2 taking action.

3 THE COURT: But -- I'm assuming that's
4 just a policy decision there.

5 MS. SNOW: That's correct, yes.

6 THE COURT: But as far as private loans --

7 MS. SNOW: Right.

8 THE COURT: -- USDA is encouraging lender
9 not to foreclose.

10 MS. SNOW: Yes. But it has no control --

11 THE COURT: But no legally enforceable
12 prohibition against doing so.

13 MS. SNOW: That's correct, yes.

14 THE COURT: All right. Any final remarks
15 or arguments or issues that I've overlooked that you want
16 to address?

17 Mr. Boucek, I'll start with you.

18 MR. BOUCEK: No, sir. Not unless the
19 Court has any questions. We thank the Court for its
20 time.

21 Just one final point. We did offer the
22 plaintiff's declaration as an attachment. I ask that
23 that be entered into evidence.

24 If there is any objection, please let me
25 know.

1 THE COURT: Any objection to that?

2 MS. SNOW: No objection, Your Honor.

3 THE COURT: All right. Ms. Snow.

4 MS. SNOW: Yes, Your Honor. I would like
5 to address a few points on irreparable harm.

6 THE COURT: Okay.

7 MS. SNOW: So I just would like to start
8 with the point that any injunction here would not help
9 plaintiff, but would only impose harm on others.

10 And in keeping in mind the appropriateness
11 of an injunction, the Court should be considering the
12 harm that would be imposed on others who are expecting
13 this type of relief and are in need of it.

14 But there are a few specific points I just
15 want to make on the law that, with respect to damages and
16 the appropriate remedy that we were discussing
17 previously.

18 And first of all, this, again, is not a
19 case -- this is not a damages case. Plaintiff has not
20 made a claim of past harm for which damages would be
21 applicable. He has made a claim for injunctive relief,
22 which under -- in *Bowen v Massachusetts* --

23 THE COURT REPORTER: Wait. Which one?

24 MS. SNOW: *Bowen v Massachusetts*, at 895
25 in particular, makes this distinction clean. When you're

1 talking about entitlement to monetary relief provided by
2 a statute, that is not damages. That's -- there is a
3 distinction between monetary damages and monetary relief.
4 We're dealing with monetary relief.

5 Plaintiffs claim that others are entitled
6 to funds under a statute that he is saying he's not
7 entitled to. But that's not damages; and, therefore,
8 sovereign immunity is not an issue.

9 Secondly, because sovereign immunity is
10 not an issue, the Court does have power to order relief
11 here that would expand the class of beneficiaries under
12 the statute. Again, that's in *Califano v Westcott*. The
13 Wynn Court did not address *Califano v Westcott*, it only
14 addressed *Bowen v Massachusetts*, which deals with the
15 damages distinction.

16 *Califano v Westcott* states, at 89 through
17 90, that in other cases where an equal protection claim
18 is ultimately, ultimately succeeds on the merits,
19 *Califano* states that the Supreme Court has repeatedly
20 affirmed District Court judgments ordering that Federal
21 financial benefits be paid to members of an
22 unconstitutionally excluded class.

23 And, again, as *Sessions v Morales-Santana*
24 states, whether the Court issues, orders that kind of
25 remedy depends on the intent of Congress.

1 So that gets to my next point, which as we
2 discussed earlier, the intent of Congress here would be
3 to extend benefits. And that is illustrated first by the
4 fact that Congress did appropriate unlimited funds under
5 this statute, and did not set a deadline for their
6 expenditure.

7 And second, Congress was plainly acting
8 with the interests of farmers, socially disadvantaged
9 farmers in mind who had a need for this relief.

10 And under *Califano v Westcott*, if
11 withdrawing funds -- if a remedy that would withdraw
12 funds from the targeted class would impose hardship on
13 them, that is a significant concern that the Court should
14 keep in mind that illustrates that Congress would have
15 intended that the class of beneficiaries actually be
16 expanded in order to prevent harm to those who Congress
17 meant to protect.

18 And then, finally, plaintiff has not --
19 plaintiff's harm here is essentially or basically that
20 funds are going to others, but not to him. And that kind
21 of harm is compensable for all the reasons just
22 explained, that the Court could order a remedy that
23 expands funds to others. And that distinguishes this
24 case from other Sixth Circuit cases where the likelihood
25 of success on the merits has also meant that there is

1 irreparable harm.

2 Under Sixth Circuit law, even in Vitolo,
3 the Court did not say that there is a just blanket
4 one-size-fits-all rule that any time you are likely to
5 succeed on the merits in a constitutional claim there is
6 per se irreparable harm. It's simply a general principle
7 that does not apply in all cases.

8 And that general principle does not apply
9 here, because it cannot override the substantive law on
10 equal protection remedies, as stated in Sessions v
11 Morales-Santana, which looks to the legislature's intent
12 as to what kind of remedy to order in equal protection
13 cases. So the Sixth Circuit's general statements cannot
14 override that.

15 And Vitolo is not applicable to this
16 situation because, as discussed earlier, the funds
17 allocated under the statute in Vitolo were limited.
18 Under the text of the statute, it was undisputed that the
19 funds were limited. They were very likely to run out
20 during the litigation. And the individuals who were not
21 prioritized to receive funds, who were suing in that
22 case, were very likely to be deprived of any right to
23 obtain them without an injunction.

24 But in this case, the situation is
25 entirely different. There is no limited allocation of

1 funds that the plaintiff would not be able to access if
2 you shows he's entitled to them in the normal course of
3 litigation.

4 So for all of those reasons -- you know,
5 the Sixth Circuit case law does not apply. And
6 plaintiff's requested injunction is actually contrary to
7 the substantive case law on equal protection remedies
8 which looks to Congress's intent.

9 Again, an injunction here would not help
10 him in any way. He doesn't -- in the -- during the -- he
11 doesn't allege any need for these funds. His only
12 complaint is that they're going to others. But that kind
13 of harm can be remedied, because the Court can order more
14 expansive relief at the end of this case, if it
15 determines that's warranted.

16 So for all those reasons, and because
17 plaintiff is unlikely to succeed on the merits, the PI
18 motion should be denied.

19 THE COURT: Any final words, Mr. Boucek?

20 MR. BOUCEK: I'll just briefly respond on
21 irreparable harm.

22 Respectfully, the government's position on
23 this is trying to distinguish something out of Vitolo
24 that the opinion will not permit. The Vitolo opinion was
25 very careful and very unequivocal on this point. An

1 irreparable harm results from differential racial
2 treatment, period.

3 Here I'm quoting from the very next to
4 last paragraph of the Vitolo opinion. The plaintiffs are
5 entitled to an injunction pending appeal. Since the
6 government failed to justify its discriminatory policy,
7 the plaintiff will win on the merits of their
8 constitutional claim. And like in most constitutional
9 cases, that is dispositive here.

10 The Sixth Circuit then went on to cite
11 four different Sixth Circuit opinions reaching back to
12 2001 in support of this proposition.

13 It is very clear that in the Sixth
14 Circuit, perhaps not in the Fifth, perhaps not in the
15 Eighth, but in the Sixth Circuit a finding of a
16 constitutional violation is a per se irreparable harm.

17 We disagree that funding is an appropriate
18 remedy. However, even if funding could be the ultimate
19 remedy, the funding at the end of the case would never be
20 able to repair the irreparable injury that occurred in
21 the interim time period between the Court, between
22 Mr. Holman filing his complaint, the program being
23 administered, and the resolution of the case. Each and
24 every day that goes on during that interim period
25 Mr. Holman will be suffering a deprivation of his

1 constitutional rights.

2 The suggestion of government is that
3 Mr. Holman won't be harmed by differential treatment on
4 the base his race if he's later compensated for it. This
5 is -- absent a showing of economic need at least.

6 This is a suggestion that the Faust Court
7 took exception to. In fact, the Faust Court said that is
8 an astonishing suggestion for the government to make. It
9 is, of course, an intangible and irreparable harm for the
10 government to deny its citizens a benefit that accords to
11 other citizens on the basis of race.

12 It doesn't matter whether or not he needs
13 access to those funds right now. Of course, the
14 government isn't only giving, only giving 1005 fund
15 available to socially disadvantage farmers who actually
16 make a showing of need.

17 Your Honor, for those reasons, I would
18 respectfully point out that what the Court should do at
19 the preliminary injunction stage is preserve the status
20 quo. Perhaps we are wrong, and the Court can order
21 funding. I don't think we are. The Wynn Court didn't
22 think we are.

23 But even if we're wrong, the Court can
24 still order that remedy if it halts enforcement now. If,
25 however, we're right, and the Court doesn't fault

1 enforcement of the program, then the Court will be left
2 with no remedy other than to somehow order the government
3 to reclaim all of these funds that it sent out. And
4 there is no public interest in that.

5 The Sixth Circuit a finding of likelihood
6 of harm is dispositive. That's the holding in Vitolo.
7 And for that reason, we respectfully submit that
8 plaintiff's entitled to an injunction.

9 THE COURT: All right. Anything --

10 MS. SNOW: If I can make one or two final
11 point here, Your Honor.

12 THE COURT: Okay.

13 MS. SNOW: Just with respect to Vitolo,
14 again, it did not say that likelihood of success on the
15 merits of a constitutional claim is per se irreparable in
16 every case. And in that case, the Court did not consider
17 the Supreme Court substantive case law on equal
18 protection remedies, because it wouldn't have had -- it
19 really wouldn't have been applicable there, where there
20 was a limited pot of funds. Here we have an unlimited
21 pot of funds. Damages -- sovereign immunity is not at
22 issue.

23 And so because Congress would have
24 intended that the beneficiaries of this fund be protected
25 and still receive them, it would have intended that the

1 appropriate, that the remedy here be to expand the class
2 of other, of eligible recipients instead withdrawing them
3 entirely.

4 The Wynn Court did not address Califano v
5 Westcott, which discusses that type of remedy in detail.
6 And neither did Vitolo. And because of the factual
7 differences in that case, its conclusion that in general
8 constitutional violations constitute irreparable harm is
9 just not applicable here.

10 And because plaintiff is, can be
11 compensated at the end of this case by an order that
12 would expand remedy, expand relief to others, he just has
13 not shown any irreparable harm. And that is kind of a
14 fundamental understanding of how, of preliminary
15 injunctions. When the harm is compensable, then it is
16 not irreparable.

17 And then one final point I would like to
18 make, Your Honor. With respect to the harm to others
19 that an injunction would impose, even plaintiff agrees
20 that harm to others should be considered. He made a very
21 significant portion of his briefing making that point
22 that, you know, that harm to others should be considered.
23 He just relied on an incorrect legal theory that this is
24 debt forgiveness, and it's not.

25 But the point is that all parties are in

1 agreement that harm to others should be considered. And
2 so because an injunction that entirely would immediately
3 cut off benefits to others, would cause substantial harm
4 to others, that, you know, weighs against ordering a
5 preliminary injunction in this case.

6 And I guess just one final brief point is
7 that it is clear that Congress would have intended more
8 expansive, more expansive relief to those who are not
9 already included within the statute as the appropriate
10 remedy. The extent of what that more expansive relief
11 would be, we would like to brief in the future, if the
12 Court determines that this program as being implemented
13 is unconstitutional.

14 But we think the Court can conclude at
15 this time that the appropriate remedy would be an
16 expansion of benefits; and, therefore, an injunction is
17 not warranted here.

18 THE COURT: All right. Thank you,
19 Counsel. We'll get you an opinion out very soon.

20 MS. SNOW: Thank you.

21 THE COURT: Have a good day.

22 Audrey, good to see you.

23 MR. BOUCEK: Thank you, Your Honor.

24 THE COURT: Thank you.

25 MS. CALKINS: Good to see you too, Judge.

1 THE COURT: Thank you.

2 (End of Proceedings.)

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1 I, Kristi Heasley, do hereby certify that the
2 foregoing 80 pages are, to the best of my knowledge,
3 skill and ability, a true and accurate unredacted
4 transcript from my stenotype notes in the matter of:
5 ROBERT HOLMAN

6)
7 VS)NO.1:21-CV-01085-STA
8)JACKSON, TENNESSEE
9)
10 THOMAS J. VILSACK, in his)
11 official capacity as Secretary of the)
12 United States, Dept of Agriculture,
13

14 ZACH DUCHENEAUX, in his
15 official capacity as Administrator
16 of the Farm Service Agency
17

18 Dated this 8th day of July, 2021.
19
20
21

22 /s/ Kristi Heasley
23
24
25

Kristi Heasley, RPR
Official Court Reporter
United States District Court
Western District of Tennessee
Eastern Division